Elite Digital Technologies Sdn Bhd v Abdullah Nawawi Mohamed (Ketua Pengarah Bahagian Penguatkuasa) Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–23 OF 2003
FAIZA TAMBY CHIK J
14 APRIL 2003

Administrative Law — Remedies — Mandamus — Goods seized in raid — No further steps taken by respondent under the Optical Discs Act 2000 — Application for release and return of the goods — Specific Relief Act 1950 s 44; Rules of the High Court 1980 O 53

The applicant applied for an order of mandamus for the release and return of goods seized and sealed by the respondent sometime in October 2002. The goods were seized and sealed by the respondent under the Optical Discs Act 2000 ('the Act'). The respondent failed to make out any charges against the applicant despite a lapse of more than five months from the date of seizure. The respondent also failed to release the goods to the applicant. Meanwhile, the applicant suffered daily losses and had exposed itself to liability for damages to third parties for breach of contract. The applicant's production was in danger of coming to a complete standstill.

Held, allowing the application:

There had been no prosecution under the Act despite the fact that the said machines and accessories were seized by the respondent more than five months ago. The court found that the respondent had failed to exercise the powers given to him under s 46(3), (4) and (5) of the Act. This had resulted in the applicant continually suffering losses (see para 6).

[**Bahasa Malaysia summary**

Pihak pemohon telah memohon untuk suatu perintah mandamus supaya barang-barang yang dirampas dan disita oleh responden pada bulan Oktober 2000 dilepaskan dan dikembalikan. Barang-barang tersebut telah dirampas dan disita oleh responden di bawah Akta Cakera Optik 2000 ('Akta tersebut'). Responden telah gagal untuk membuat sebarang tuduhan terhadap pemohon meskipun lima bulan telah berlalu dari tarikh rampasan. Responden telah juga gagal untuk melepaskan barang-barang tersebut kepada pihak pemohon. Sementara itu, pihak pemohon telah mengalami kerugian harian dan telah mendedahkan dirinya kepada liabiliti untuk gantirugi kepada pihak-pihak ketiga untuk kemungkiran kontrak. Pengeluaran pihak pemohon berada dalam bahaya berhenti dengan seluruhnya.

Diputuskan, membenarkan permohonan itu:

Tidak terdapat sebarang dakwaan yang dibuat di bawah Akta tersebut

walaupun fakta bahawa mesin-mesin tersebut telah dirampas oleh responden lebih daripada lima bulan yang lepas. Mahkamah telah mendapati bahawa responden telah gagal untuk melaksanakan kuasa-kuasa yang diberikan kepada beliau di bawah seksyen 46 (3), (4) dan (5) Akta tersebut. Ini telah mengakibatkan pemohon mengalami kehilangan kerugian dengan tidak berhenti-henti (lihat perenggan 6).]

Notes

For cases on mandamus, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 554–583.

Legislation referred to

Optical Discs Act 2000 s 46(3), (4), (5), (6)
Rules of the High Court 1980 O 53 r 3
Specific Relief Act 1950 s 44(1), Chapter VIII

ST Lee (ST Lee & Partners) for the applicant.

Faiza Tamby Chik J:

[1] The application filed herein is for an order of mandamus that the respondent or his officers do release and return the two sets of Krauss Maffei Marathon CD Liner, including all the accessories to the applicant, which were seized and sealed by the respondent or his officer on 12 and 14 October 2002 at the applicant's factory at No 56, Jalan TPP 1/19, 121/2 Miles, Off Jalan Puchong, Taman Industrial Puchong, 47100 Selangor Darul Ehsan forthwith .

[2] The applicant has obtained leave to file this application pursuant to O 53 r 3 of the Rules of the High Court 1980 on 10 March 2003. The notice of hearing of judicial review was served on the respondent on 19 March 2003 at 11.05am and the affidavit of service filed on 3 April 2003. The applicant is a company incorporated under the Companies Act 1965 with an address at No 56, Jalan TPP 1/19, 121/2 miles, off Jalan Puchong, Taman Industrial Puchong, 47100 Selangor Darul Ehsan. The respondent is a public officer who has been appointed a Controller of Optical Disc by Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna at Tingkat 24–26, Putra Place, 100 Jalan Putra, 50622 Kuala Lumpur.

[3] The applicant has obtained all the valid licences and certificates which have been exhibited as 'TKY-9' in the affidavit for the operation of its business. On 12 and 14 October 2002 when the respondent's enforcement officers carried out the raid on the applicant's factory, two sets of Krauss Maffei Marathon CD Liner including all the accessories and 6500 Video Compact Discs ('VCDs') without sid code were seized by the raiding officers. The Deputy Director of Compact Discs issued three search lists. In the search lists, it has been expressly provided that 'Barang-barang yang disita ini hendaklah dituntut secara bertulis dalam tempoh 30 hari. Kegagalan berbuat demikian boleh menyebabkan barang-barang tersebut dilepaskan mengikut peruntukan undang-undang'. Since the seizure of the

machines and the VCDs without sid code took place on 12 and 14 October 2002, it has been more than five months until now and the respondent has not made out a charge against the applicant under the Optical Discs Act 2000. On 14 October 2002, immediately after the seizure, the applicant wrote to the respondent, the Legal Advisor and the Chief Deputy Director of the Enforcement Division for the release of the optical disc machine to enable it to operate its business, otherwise it would suffer irreparable loss. The said letter dated 14 October 2002 is exhibited as 'TKY-7' in the affidavit of Teoh Kheng Yong. On 3 December 2002, the applicant through its solicitors, CW Chan & Co wrote to the Head of the Prosecution Division to consider cancelling the seizure of the said machines and allow the applicant to operate the machines again. The letter dated 3 December 2002 is exhibited as 'TKY-3' in the affidavit of Teoh Kheng Yong. Again on 6 February 2003, the said solicitors CW Chan wrote to the Head of the Prosecution Division to consider the hardship of the applicant and to release the seized items under a court bond with conditions. The letter dated 6 February 2003 is exhibited as 'TKY-10' in Teoh Kheng Yong's affidavit. The 6500 VCDs without sid code seized by the respondent on 12 October 2002 are not goods that belonged to the applicant. Minoco Trading delivered the VCDs without sid code to the applicant on 12 October 2002 at 1.00 p.m. and it was received by David Chong, a servant, without the knowledge of the managing director. The respondent's enforcement officers raided the applicant's factory on the same day at about 2.45pm. and seized the applicant's machines without allowing the applicant to operate the said machines for its daily productions.

[4] The applicant has invested a sum of RM5m for purchasing the machines and accessories for producing compact discs. The machines are still under hire-purchase with Affin Finance Bhd. and Southern Finance Bhd. The monthly instalments are about RM80,000 and the applicant has to pay RM7,500 as monthly rental for the factory premises. The applicant has employed workers in the factory for operating and manufacturing the productions. The salaries of the workers and the payment of their Employees Provident Fund comes up to RM60,000 per month. Since the respondent has sealed up the machines on 12 October 2002, the operation of the factory for production has practically come to a standstill. The workers are not able to carry out any work since the machines have been seized and sealed by the respondent. The applicant has entered into agreements with several companies for rendering services for the supply of educational compact discs to schools. Since the seizure of the machines and the accessories by the respondent, the applicant cannot fulfil its obligations under the contract. The applicant will be eventually liable for damages for breach of contract. The applicant has suffered great loss in the estimated sum of RM150,000 per month since the seizure of the machines by the respondent on 12 and 14 October 2002 respectively. As it stands, the applicant has suffered a loss of about RM411,589.17. In the event the machines are not released, it would cause the applicant's factory to close down either in the month of March or April 2003.

[5] Section 46 of the Optical Discs Act 2000 provides:

> (3) Where there is no prosecution with regard to any article, optical disc, thing, book or document seized in exercise of any powers conferred under this Act, the article, optical disc, thing, book or document shall be taken and deemed to be forfeited at the expiration of one calendar month from the date it was seized unless a claim thereto is made before that date in the manner set out in subsection (4), (5) and (6);
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> (4) Any person asserting that he is the owner of any article, optical disc, thing, book or document seized under this Act and that the article, optical disc, thing, book or document is not liable to forfeiture may personally or by his agent authorized in writing by him give written notice to an Assistant Controller of his claim;
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> (5) On receipt of a notice under subsection (4), the Assistant Controller shall refer the notice to the Controller who may, after such enquiry as may be necessary, direct that such article, optical disc, thing, book or document be released or forfeited or refer the matter to the Court of a First Class Magistrate for decision;
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> (6) The court to which the matter is referred shall issue a summons requiring the person asserting that he is the owner of the article, optical disc, thing, book or document and the person from whom it was seized to appear before the court and upon their appearance or default to appear, due service of the summons being proved, the court shall proceed to the examination of the matter, and on proof that an offence under this Act has been committed and that such article, optical disc, thing, book or document, was the subject matter or was sued in the commission of such offence, shall order the article, optic disc, thing, book or document to be forfeited or may in the absence of such proof, order the release of such article, optical disc, thing, book or document to the person entitled to it.

[6] It is observed that in the instant case despite the fact that the said machines and accessories were seized by the respondent more than five months ago, there has been no prosecution under the Optical Discs Act 2000 with regards to the optical discs, the accessories and the VCDs without sid code. The respondent has failed to exercise the powers given to him under s 46(3), (4), (5) and (6) and no step has been taken to release the said machines. This has resulted in the applicant continually suffering losses. The applicant has filed this application under Chapter VIII s 44(1) of the Specific Relief Act 1950 which provides that:

> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forebearing or doing, as the case may be, of the said specific act;
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> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
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> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
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> (d) the applicant has no other specific and adequate legal remedy; and
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> (e) the remedy given by the order applied for will be complete.

[7] Despite the several letters being written to the respondent, the the applicant's request was ignored and the respondent has failed to take any of the steps provided under the Optical Discs Act 2000. To sum up, in view of the facts and points of law, I am of the view that the applicant has sufficient grounds to pray for an order in terms as set out in the notice of hearing of judicial review. I therefore grant the applicant an order in terms of its application.

Application allowed.

Reported by Eugene Jayaraj